IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

WILLIAM H. SWARTZ and DIANE C.
PACE, as Trustees of the WILLIAM
H. SWARTZ and DIANE C. PACE TRUST,

          No. 1:14-cv-597-CL

       Plaintiffs,

   v.

KAREN FORD TURNER and MONTY   **ORDER**
TURNER,

       Defendants.

_____

PANNER, District Judge:

    Magistrate Judge Mark D. Clarke filed a Report and
Recommendation (R&R), and the matter is now before this court.
See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). When a
party objects to any portion of a Magistrate Judge's R&R, the
district court makes a de novo determination of that portion of
the Magistrate Judge's report. 28 U.S.C. § 636(b)(1)(C);
McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F. 2d

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1309, 1313 (9th Cir. 1981).

Here, the parties object to the R&R, so I have reviewed this matter de novo. I adopt the R&R except as to Defendants' request for attorney's fees.

BACKGROUND

Plaintiffs leased real property to Defendants under a written agreement. Plaintiffs now bring a claim for waste against Defendants, alleging Defendants caused about $30,000 in damage to the leased property.

The R&R recommends dismissing this action without prejudice based on the forum selection clause in the lease. The R&R also recommends denying Defendants' request for attorney's fees because the dismissal is not on the merits and is without prejudice.

DISCUSSION

I. Plaintiffs' Objections

Plaintiffs object to the R&R's recommendation that this action be dismissed without prejudice because of the forum selection clause in the lease. I agree with the R&R that forum selection clause applies here.

II. Defendants' Objections

Defendants object to the R&R's conclusion that they are not entitled to attorney's fees. Defendants rely on the lease provision governing attorney's fees:

> If suit or action is instituted in connection with any controversy arising out of this Agreement, the prevailing party in that suit or action or any appeal therefrom shall be entitled to recover, in addition to

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any other relief, the sum which the court may judge to
be reasonable attorney fees.

Defendants argue they are entitled to attorney's fees because
Plaintiffs "instituted" this action "in connection with [a]
controversy arising out of" the lease, and Defendants "prevailed
by successfully enforcing the terms of the lease and specifically
the forum selection clause." Defs' Objection 2.

The R&R concludes that under Oregon law, Defendants are not
entitled to fees because they did not succeed on the merits. I
agree that Defendants have not prevailed on the merits because
dismissal is without prejudice. See Offshore Sportswear, Inc. v.
Vuarnet Int'l, B.V., 114 F.3d 848, 851 (9th Cir. 1997) ("Because a
dismissal to enforce a forum selection clause is not a
determination on the merits of any cause of action, it is
appropriately 'without prejudice' so that the merits can be
litigated elsewhere."). But the attorney's fees provision at
issue does not require that a party prevail on the merits, only
that a party prevail in an action "instituted in connection with
any controversy arising out of this Agreement." Defendants here
prevailed in this action by obtaining dismissal based on the forum
selection clause, even though dismissal is without prejudice.
Under the terms of the lease, Defendants are entitled to
attorney's fees incurred enforcing the forum selection clause.
See also Ricciardi v. Frink, 133 Or. App. 436, 447, 891 P.2d 1336,
1342 (1995) (upholding award of attorney's fees to party who
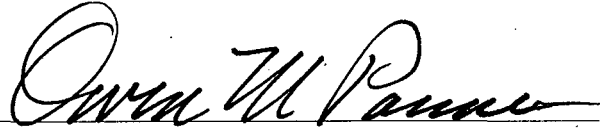obtained dismissal of action without prejudice based on forum

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selection clause).

CONCLUSION

Magistrate Judge Clarke's Report and Recommendation (#16) is adopted in part. Defendants' motion to dismiss (#9) is granted as to the forum selection clause and this action is dismissed without prejudice. Defendants may file a motion for attorney's fees and costs within 14 days, with supporting documents. Plaintiffs may file a response brief within 10 days.

IT IS SO ORDERED.

DATED this ___19___ day of November, 2014.

OWEN M. PANNER
U.S. DISTRICT JUDGE

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